Filed 6/6/03 In re Dante L. CA1/4

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

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| In re DANTE L., a Person Coming Under the Juvenile Court Law. | |
| THE PEOPLE,<br>Plaintiff and Respondent,<br>v.<br>DANTE L.,<br>Defendant and Appellant. | A100900<br><br>(Contra Costa County Super. Ct. No. J9902068) |

Dante L. appeals from the dispositional order continuing him as a probationary ward of the juvenile court and from conditions of his probation. This order was made after a contested jurisdictional hearing at which the juvenile court sustained a petition in which it was alleged that Dante had committed first degree burglary (Pen. Code, §§ 459-460).

This is the minor's second appeal. In the first, we reversed because police had improperly questioned Dante after he had invoked his right to counsel. (*In re Dante L.* (Aug. 6, 2002) A096867 [nonpub. opn.].) When the case returned to juvenile court, a second jurisdictional hearing was conducted. The first witness was Ms. Vega, the owner of the residence, who testified to the break-in of her son's bedroom and the removal of a number of items, including a distinctive yellow flashlight that was also a radio. On the same day of the burglary, Deputy Sheriff Cushman, who was investigating the incident,

found the flashlight in the possession of a juvenile named M.C. Ms. Vega identified it as the one missing from her son's bedroom. Having been granted immunity from prosecution, M.C. testified that he saw Dante coming out of a house with a broken window. Dante was carrying a bike and a video play station. Dante told M.C. that no one lived in the house. According to M.C., Dante "gave me a flashlight with a radio on the side." M.C. in turn gave it to Deputy Cushman.

The next witness was D.N., who also testified under immunity. He testified that he went into a house that "somebody had broke in" with Dante and M.C. Dante, M.C. and a girl picked up items in the house. Dante "left" with "stuff." He did not see who broke the front window of the house. The district attorney asked him if he was afraid to be in court and D.N. admitted he was frightened. The court then continued the matter to the following day. D.N. repeatedly said he did not remember telling the prosecutor he saw somebody break into the house. His nervousness prompted concern from the court, which eventually ruled that "He [D.N.] is reluctant to testify, so apparently, the direct examination is not completed yet because of his reluctance. I'm going to find that this witness is unavailable as a witness under 240 of the Evidence Code, and his testimony as such will not be considered by the Court." Dante's counsel, arguing that D.N.'s situation did not meet the statutory criteria for unavailability, unsuccessfully asked the court to "reconsider its finding that that witness is unavailable" and "to not allow Deputy Kohlmaier to testify" about statements D.N. made about the burglary.

The next witness was Deputy Sheriff Kohlmaier, who testified that after the burglary he spoke with D.N. According to Deputy Kohlmaier, D.N. told him that "he was standing fairly close when it happened, and he said that Dante and another gentleman, [M.C.], were at the door, and him and another gentleman were standing a bit away from the residence. [¶] . . . [¶] He said that Dante . . . broke the window next to the door with an object, I believe he said a metal pipe or something to that effect, and reached his hand through the . . . window and opened the front door and entered the residence and entered with [M.C.]. And actually, [D.N.] and [the fourth youth] said that they followed suit."

The final witness was Deputy Cushman, who testified that when he spoke to M.C. very shortly after the burglary, M.C. did not mention Dante as one of the burglars.

At the conclusion of the hearing, the court ruled as follows: ". . . I certainly agree based on the evidence that I have heard—as it relates to [D.N.], I've already indicated that I did not consider and will not consider anything that he said because he's unavailable. However, the evidence—I did find [M.C.] truthful. I watched his demeanor. I believed what he said based on my direct observance of his testimony, and I do believe what was testified by Detective Kohlmaier as it relates to his statements by the minor [i.e., D.N.] and; therefore, the Court finds true beyond a reasonable doubt each and every element contained in Count 1 of the supplemental 602 petition . . . ."

Dante presents four claims of error. His first has two parts. He argues that the trial court erred in determining that D.N.'s situation constituted "unavailability" for purposes of Evidence Code section 240. He then argues that the trial court erred in permitting Deputy Kohlmaier to testify as to D.N.'s hearsay statements in the belief that the statements constituted prior inconsistent statements authorized by section 1235 of the Evidence Code. Merging these arguments, Dante insists that the admission of D.N.'s hearsay statements violated his constitutional rights to confrontation and cross-examination.

Evidence Code section 240 states a number of grounds on which a witness may be deemed "unavailable." None of these criteria is an obvious match for D.N.'s situation. But one of the grounds—"unable . . . to testify . . . because of then existing physical or mental illness or infirmity" (Evid. Code, § 240, subd. (a)(3))—has been given broad interpretation. Our Supreme Court has adopted this test: " '[T]he illness or infirmity must be of comparative severity; it must exist to such a degree as to render the witness's attendance, or his testifying, relatively impossible and not merely inconvenient. However, we cannot say just what illness or infirmity must be shown or the degree of its severity, leaving that determination to a trial court's discretion.' " (*People v. Rojas* (1975) 15 Cal.3d 540, 550-551; accord, *People v. Stritzinger* (1983) 34 Cal.3d 505, 517.) A witness's refusal to testify, or to selectively answer questions, has been held to satisfy

this standard. (*People v. Francis* (1988) 200 Cal.App.3d 579, 587-588.) Before declaring D.N. to be unavailable, the juvenile court twice noted that the witness "is not responding to the questions" and was "unwilling to answer" the district attorney's questions. Having already adjourned the previous day in order to facilitate D.N.'s testimony, the juvenile court apparently concluded that what was initially thought to be nervousness was in fact refusal to answer questions. This determination was obviously based upon the court's personal observation of D.N. during two days in the witness chair. This is the quintessential situation for a reviewing court to defer to a trial court's exercise of discretion. From our review of this record we cannot conclude that the juvenile court abused its discretion by finding that D.N. was unavailable as a witness.

Dante's argument concerning Deputy Kohlmaier's testimony is premised on the unassailable logic that once D.N.'s testimony was in effect stricken in its entirety, there was no evidence of a statement with which D.N.'s statement to Kohlmaier would be inconsistent, and therefore no basis for admitting the deputy's testimony about D.N.'s hearsay statements under Evidence Code section 1235. (See *In re Deon D*. (1989) 208 Cal.App.3d 953, 963; *People v. Rios* (1985) 163 Cal.App.3d 852, 864.)

The record shows that Dante objected to Deputy Kohlmaier's expected testimony: "Now I'm faced in a situation where somebody else is going to testify to some supposed statement that the last witness [D.N.] made. I'm deprived of my right to cross-examine. How can I cross-examine a deputy who is going to say what another person said? . . . I can't show the Court that witness is or is not being truthful." This objection appears well taken if the basis for admitting D.N.'s hearsay statements was Evidence Code section 1235.

Admission of prior inconsistent statements pursuant to Evidence Code section 1235 does not violate constitutional rights of confrontation and cross-examination if the declarant is present in court and subject to cross-examination. (See *People v. Zapien* (1993) 4 Cal.4th 929, 955 and decisions cited.) D.N.'s testimony was, in effect, stricken before Dante ever had an opportunity to cross-examine and Dante's motion to keep him subject to recall was denied.

The Attorney General makes no attempt to defend admission of D.N.'s prior statements under Evidence Code section 1235. He does argue that D.N.'s statements would be admissible under section 1230 as statements against D.N.'s penal interests. We agree. The clear inference from the entirety of D.N.'s statements was that the burglary was a joint enterprise of the four participants. Dante may have broken the window to obtain access, but all four—including D.N.—then entered the Vega home. The principle behind section 1230 establishes this exception to the hearsay rule as firmly established. (See *People v. Wilson* (1993) 17 Cal.App.4th 271, 278; 1 Witkin, Cal. Evidence (4th ed. 2000) Hearsay, § 143, pp. 854-855.) As a firmly rooted exception, it satisfies the Sixth Amendment. (*Ohio v. Roberts* (1980) 448 U.S. 56, 66; *People v. Wilson*, *supra*, at p. 278.)

Due to the state of the record, we do not know the basis for admitting D.N.'s hearsay statements. We therefore have no basis for assuming that the evidence was admitted on an incorrect basis, i.e., pursuant to Evidence Code section 1235. (E.g., *In re Manuel G*. (1997) 16 Cal.4th 805, 823; *People v. Wiley* (1995) 9 Cal.4th 580, 592, fn. 7.) Dante has therefore failed to carry his burden of establishing error by an adequate record. (E.g., *In re Kathy P*. (1979) 25 Cal.3d 91, 102.)

Dante next contends that "the law that a criminal conviction cannot be based on uncorroborated accomplice testimony should apply to juvenile court adjudications." Although Dante presents this argument as if it were an open issue whether Penal Code section 1111 should apply to juvenile proceedings, the substance of Dante's argument was rejected by our Supreme Court in 1978. (*In re Mitchell P*. (1978) 22 Cal.3d 946, 949-953.) Dante submits that "significant changes in the law" warrants revisiting the issue. If this is so, the revisiting must be done by our Supreme Court. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) Dante further contends that the evidence was insufficient for the juvenile court to conclude that he was a participant in the burglary. Dante's argument consists of challenging the evidence from D.N. (via Deputy Kohlmaier) and M.C. as "uncorroborated accomplice testimony" that is "particularly unreliable." As for the testimony of D.N. and M.C., their status as

accomplices is without consequence because, as just mentioned, our Supreme Court has determined that the ordinary rule requiring corroboration of accomplices (Pen. Code, § 1111) does not apply to proceedings in juvenile court. (*In re Mitchell P.*, *supra*, at p. 946.) As for their "reliability," this is merely an attempt to reargue their credibility, a matter entrusted exclusively to the juvenile court. (E.g., *People v. Maury* (2003) 30 Cal.4th 342, 403.) In any event, the evidence is more than sufficient. Ms. Vega's testimony establishes the illegal entry and removal of personal property. The juvenile court could conclude from M.C.'s testimony that Dante participated in the entry and left with the distinctive flashlight. Dante's possession of the flashlight so soon after its removal from the Vega home would require only minimal corroboration to justify a finding of burglary. (E.g., *People v. Mendoza* (2000) 24 Cal.4th 130, 175-176.) D.N.'s statements provided that corroboration. Both M.C. and Deputy Kohlmaier were found credible by the juvenile court, and we have no power to overturn that assessment. (*People v. Maury*, *supra*, at p. 403.) Their testimony, together with that from Ms. Vega, are sufficient to support a finding that Dante committed the burglary. (E.g., *People v. Manson* (1976) 61 Cal.App.3d 102, 208.)

One of the conditions of Dante's probation is that he have "no gang association, clothing, insignia, signs or activities." Dante's final argument is that this condition is overbroad and vague. The condition was adopted at the recommendation of the probation officer, who suggested it in his report. Dante had an opportunity at the dispositional hearing to object to this condition. Because he did not do so, the issue has not been preserved for appeal. (E.g., *People v. Welch* (1993) 5 Cal.4th 228, 237; *In re Josue S.* (1999) 72 Cal.App.4th 168, 172-173 and decisions cited.)

The dispositional order is affirmed.

Kay, P.J.

We concur:

Reardon, J.

Sepulveda, J.